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JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 220

JOAN SCHNAUDER and PATRICIA SCHNAUDER,
Through JOYCE SCHNAUDER, Their Next Friend,
Petitioner,

versus

PEERLESS INSURANCE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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PEERLESS INSURANCE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorables, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Joan Schnauder and Patricia Schnauder, through Joyce Schnauder Ernest, Their Next Friend, with respect shows unto this Honorable Court as follows, to-wit:

CITATION TO OFFICIAL REPORT OF OPINION DELIVERED IN THE COURT BELOW.

The only opinion rendered by the Court below is as yet unreported, copy of which is to be found in Appendix "I" to the transcript of the record filed herewith.

GROUNDS FOR THE COURT'S JURISDICTION.

The decree sought to be reviewed was rendered and entered May 19, 1961.

Petitioner received stay of mandate dated June 12, 1961, and same was filed June 14, 1961.

The jurisdiction of this Honorable Court is invoked under 28 U. S. C. A. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW.

This petition involves the following questions for determination by this Honorable Court:

(a) Can an appellate court substitute its own law for that of the established State jurisprudence?

(b) Can an appellate court disregard the jury's findings of fact and substitute its own findings of fact when there is evidence supporting the jury's findings?

STATEMENT OF THE CASE.

Under date of Sunday, December 21, 1958, at approximately 9:30 A. M., one William Ganaway, a Charity Hospital employee, was operating a Charity Hospital Jeep on Gravier Street proceeding towards Charity Hospital.

That when he reached the intersection of Gravier and South Roman Streets he was involved in a collision with one Manuel Powe, who was operating his automobile on South Roman Street proceeding towards Canal Street. That the scene of the accident was only three (3) blocks from the Charity Hospital's garage for vehicles.

That as a result of said collision, William Ganaway and a female passenger in his Jeep, Mrs. Lillian Schnauder, were killed.

Mrs. Schnauder had two minor children, Patricia Schnauder and Joan Schnauder, and they have brought this action through their next friend, Joyce Schnauder Ernest, against Peerless Insurance Company, the insurer of Charity Hospital's Jeep, under the omnibus clause of the said insurance policy.

William Ganaway was the **only** employee on duty in the maintenance department under the aforesaid date, and his duties, according to the testimony of other Charity Hospital employees, were to answer calls wherein ambulances had flat tires or breakdowns while on call, and that he was also subject to answer calls for flat tires and breakdowns on approximately 26 vehicles maintained by his department and used by Dr. Leo Kerne, the hospital's director, the Catholic nuns at the hospital, and various other employees of the hospital, including the garbage and icemen. He was to also use the Jeep to procure parts for maintenance of said vehicles.

William Ganaway had been employed at Charity Hospital for five or six years prior to the herein accident and had used Charity Hospital vehicles on innumerable occasions in the course of his work.

At the conclusion of the trial the District Court submitted the following question to the jury:

"Did Mr. Ganaway have permission, express or implied, to take the Jeep out the morning of the accident?"

The jury answered said question in the **affirmative.**

The jury also found William Ganaway guilty of negligence and did thereby render a verdict in favor of Mrs. Lillian Schnauder's minor daughter, Patricia Schnauder, in the sum of $9,000.00, and also a verdict in favor of Mrs. Lillian Schnauder's minor daughter, Joan Schnauder, in the sum of $1,000.00. Respondent prosecuted an appeal to the Court of Appeals for the Fifth Circuit which on May 19, 1961, reversed the finding of the jury and the judgment of the District Court in its entirety and rendered judgment for respondent.

ARGUMENT OF REASONS RELIED UPON FOR THE ALLOWANCE OF THIS WRIT OF CERTIORARI.

The Fifth Circuit Court of Appeals in its opinion herein stated, "The Courts of Louisiana have gone far in extending coverage under the omnibus clause of insurance policies."

The Circuit Court then set out to change this situation and thus has done violence to the doctrine expressed in *Erie Railroad Company v. Tompkins*, 58 S. Ct. 817.

Louisiana law is quite clear on the question of authority of use of a vehicle under the omnibus clause of an insurance policy.

Waits v. Indemnity Insurance Co. of North America, 40 So. (2d) 746 (1949):

> "Under liability policy defining insured as any person using described truck provided actual use was with named insured's permission, driver employed by named insured with **initial** permission to use truck to transport laborers to and from their work, who used truck for driver's own pleasure after parking at place established by custom, in violation of specific instructions, was using it with insured's 'permission' so as to render insurer liable for injuries caused to third person by negligence of driver."

Dominguez v. American Casualty Company, 46 So. (2d) 744 (1950):

> **"Initial** permission of owner for use by another of automobile is all that is required to bring use of automobile within omnibus clause of an automobile liability policy providing that the word insured includes any person using the automobile with 'permission' of the named insured."

Garland v. Audubon Insurance Company, 119 So. (2d) 539 (1960):

This case cited the *Dominguez* and *Waits* cases as the controlling law. It will be noted that this is an extremely recent case.

The herein case is stronger than any of the above landmark cases in that **all** of the vehicles in said cases were used **after** working hours. Whereas in the herein case the vehicle was **used during working hours.**

It is obvious that the Circuit Court dislikes the "liberal view" of the Louisiana courts in this matter.

However, mere dislike is not sufficient to overthrow the established law and the Circuit Court has apparently sought this overthrow by citing some extremely inapplicable cases as authority.

Some of these inapplicable cases are as follows:

Parker v. Great American Indemnity Co., 81 So. (2d) 79:

In the *Parker* case the truck driver had a helper. The helper had never driven the truck previously, and had no authority to drive same. The helper and truck driver were in a house for a few hours when the helper asked for the keys to open the truck as he wished to sit and rest in said truck. Unfortunately, the same key opened the transmission and the helper unauthorizedly drove the truck and was involved in an accident.

We feel that the Court in the *Parker* case very properly **denied** omnibus coverage, because the testimony therein showed undeniably that there was no permission.

This case is extremely inapplicable to the instant case.

The Circuit Court on page 4 of its printed opinion cited *Abshire v. Audubon Insurance Company*, 99 So. (2d) 395, as the authority for production of evidence to show vehicle was being used with owner's permission.

In the *Abshire* case the plaintiff's attorney failed to show the driver was employed by the owner of the vehicle,

and he even failed to show that there was an insurance policy. The defendant denied insurance coverage.

The Court very properly remanded the *Abshire* case, **but only for the question of determining coverage and employment.**

In the instant case employment and coverage were both conclusively proven.

Mr. Harper, the Superintendent of Charity Hospital maintenance department, one of defendant's witnesses, admitted that Mr. Ganaway worked in his department. Oft-repeated testimony also proved that Mr. Ganaway used the hospital's vehicles many times in his employment.

The defendant company herein, Peerless Insurance Company, admitted in allegation six of its answer that it was the insurer of Charity Hospital and even introduced the policy in evidence during the course of the herein trial.

So, again we find that the *Abshire* case was an extremely inapplicable case for the Circuit Court to cite.

The Circuit Court also cited *Continental Casualty Company v. Quebedeaux*, 234 F. (2d) 241.

In the *Continental* case a young negro boy took his grandmother's automobile keys from her sugar bowl and **unauthorizedly** used her vehicle. He admitted that he did not ask for her keys because she would not have given her consent.

His grandmother would have refused permission, for she stated during the trial:

"Q. You would not have loaned it to him if he asked you for it?

A. Oh, no. A car is not to be loaned to children."

Therefore, it is obvious that the *Continental* case did not involve the business use of a vehicle during business hours and consequently is another case of extreme inapplicability to the instant case.

Complainant cited *Houlton v. Nichols Truck Line*, 23 So. (2d) 368 (1945):

> "The evidence, while not very clear and positive also shows that the driver of the truck was an employee of the defendant, that the defendant owned the truck, and this proof is sufficient to make out a **prima facie case** to the effect that the driver was at the time acting within the scope of his employment."

Antoine v. Louisiana Highway Commission, 188 So. 443 (1939):

> "Pedestrian who proved that truck which struck pedestrian belonged to defendant highway commission and was driven by commission's employee established prima facie case for pedestrian and raised presumption that employee was acting within scope of his employment at time of the accident."

These cases show that when a party is operating a vehicle during working hours it is presumed that he was operating with the owner's consent.

The Circuit Court cited as contrary to the above case *Standard Accident Insurance Co. v. Rivet*, 89 F. (2d) 74.

In the *Standard Accident* case the negro driver took the company vehicle out **after working hours** to give his family a joy ride. All of this was undeniably proven at the trial.

Therefore, again we have an after-hours case, wherein the evidence **conclusively** proved **personal** use. Naturally, no presumption could exist when positive proof is shown, for all presumptions are rebuttable.

It is inconceivable to the writer how the Circuit Court could infer that Mr. Ganaway used the vehicle for personal use on the date of the fatal accident.

Mr. Ganaway had worked for five or six years at Charity Hospital, and had used vehicles on innumerable occasions in the past. Therefore, we feel that it follows, that since he had used the hospital vehicles on the innumerable occasions authorizedly that we should infer that the use in the instant case was authorized.

The Circuit Court even admitted in its written opinion, "There was evidence from which it might have been inferred that Ganaway had general authority to take the Jeep out for the purpose of servicing ambulances and other vehicles and for procuring repair parts."

It follows that if a person had general authority then he necessarily had implied permission.

The *Waits* and *Dominguez* cases stated and it is the law of Louisiana that **implied** permission is all that is necessary to show authority to use a vehicle.

It is obvious that the question of authority of use was a factual one and necessarily for the jury to determine.

The jury, as we previously stated herein, was tendered by the District Court Judge, the specific question, "Did Mr. Ganaway have permission, express or **implied,** to take the Jeep out the morning of the accident"?

The jury answered said question in the **affirmative.**

However, the Circuit Court substituted its own judgment for that of the jury's. This is in direct contradiction to the case of *Lavender v. Hurn*, 66 S. Ct. 740. In the *Lavender* case this Court stated that it was only where the appellate court found a **complete absence** of probative facts to support the conclusion reached by the jury that the appellate court would substitute its judgment for that of the jury. But the Circuit Court here did not find a complete absence of probative facts to sustain the jury's findings. Indeed such cannot be said of the facts in the instant case. There were many facts admitted by defense witnesses which established that William Ganaway was employed by Charity Hospital, that he was the only employee on duty on the fatal Sunday, that he serviced 26 hospital vehicles, and that he did use hospital vehicles on innumerable occasions, all as shown by the record herein, and as witnessed by the fact that the jury so found and the trial judge denied the motions for a directed verdict and for judgment notwithstanding the verdict.

The instant case represents a dangerous departure from that rule. It is a serious invasion of the right to a trial by jury guaranteed by the statute.

Wherefore, petitioner prays that this petition be granted and that a writ of certiorari issue, directed to the United States Court of Appeals for the Fifth Circuit, commanding that Court to certify and send to this Honorable Court, for its review and determination, a full and complete transcript and record of all proceedings in the cause entitled *Peerless Insurance Company v. Joan Schnauder, and Patricia Schnauder, thru Joyce Schnauder Ernest, their next friend,* and reverse title, bearing Number 18,600 of the Docket of the Court of Appeals for the Fifth Circuit, to the end that the judgment and opinion of said Court of Appeal may be reversed by this Honorable Court and the Judgment of the Trial Court reinstated herein;

Petitioner further prays for such other and further relief in the premises as may seem proper and just.

Respectfully submitted.

A. H. REED,
Maison Blanche Building,
New Orleans 16, Louisiana,
Counsel for Petitioner.

Of Counsel:
HATTIER, SCHROEDER & KUNTZ,
1314 Richards Building,
New Orleans 12, Louisiana.

CERTIFICATE.

I, the undersigned, counsel for petitioner, hereby certify that I have served a copy of the foregoing petition upon William A. Porteous, Jr., of the firm of Porteous & Johnson, attorneys for respondent, at American Bank Building, New Orleans, Louisiana, this day of July, 1961, by mailing a copy thereof postage prepaid to William A. Porteous, Jr., Esq., in care of Porteous & Johnson, American Bank Building, New Orleans, Louisiana.

A. H. REED,
Attorney for Petitioner.

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SUPREME COURT, U. S.
JUL 17 1961
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 220

JOAN SCHNAUDER and PATRICIA SCHNAUDER,
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PEERLESS INSURANCE COMPANY,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

A. H. REED,
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Montgomery & Co., "The Brief Specialists", 430 Chartres St., N. O., La.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18600

PEERLESS INSURANCE COMPANY,

Appellant,

versus

JOAN SCHNAUDER and PATRICIA SCHNAUDER, thru JOYCE SCHNAUDER ERNEST, Their Next Friend,

Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

OPINION

(May 19, 1961.)

Before TUTTLE, Chief Judge, JONES, Circuit Judge, and MIZE, District Judge.

JONES, Circuit Judge: Suit was brought under the Louisiana Direct Action Statute[1] by the appellees,

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[1] LSA-R. S. 22:655.

Joan Schnauder and Patricia Schnauder, against the appellant, Peerless Insurance Company, the insurer of Charity Hospital in New Orleans, Louisiana, under a public liability policy. The appellees, who were plaintiffs below and who will be so designated here, claimed damages for the death of their mother as a result of a collision between a Jeep owned by Charity Hospital and driven by its employee, William Ganaway. Peerless made a motion for a directed verdict at the close of the plaintiffs' case and a like motion at the conclusion of the entire case. These motions were denied. A jury verdict was returned for the plaintiffs in the amount of $1,000.00 for Joan Schnauder and $9,000.00 for Patricia Schnauder. Peerless made and the court overruled a motion for a judgment notwithstanding the verdict. Judgment on the verdict was entered and this appeal is from that judgment.

William Ganaway was employed by Charity Hospital as a mechanic's helper. Among the motor vehicles owned and used by the Hospital was a Jeep. Among the duties sometimes performed by Ganaway was the changing of tires and other servicing of vehicles away from the garage, and when assigned to such tasks, he would be directed to use the Jeep. On the Sunday morning of December 21, 1958, Ganaway was, or was supposed to be, on duty at the Charity Hospital garage. On that morning, about nine o'clock, the Jeep, while being driven by Ganaway along Gravier Street, in New Orleans, collided at the intersection of Gravier and South Roman Streets, with a 1955 Dodge car being driven by its owner, Manuel Powe. In the Jeep with Ganaway was Lillian Schnauder, mother of the plaintiffs. She was employed at Mor-

rison's Cafeteria, on Gravier Street. Mrs. Schnauder received injuries in the collision from which she died three days later. Ganaway also died as the result of his injuries. The plaintiffs surmised that Ganaway saw Mrs. Schnauder and picked her up to give her a lift on her way to work. Peerless conjectured that Ganaway had taken the Jeep from the Hospital garage for the purpose of taking Mrs. Schnauder to her place of employment. The plaintiffs asserted that their mother's injury and death were the result of the negligence of Ganaway, the employee of the Hospital which was insured by Peerless. The defendant, Peerless, denied that Ganaway was negligent and asserted that Ganaway's use of the Jeep on the day of the collision was unauthorized and without the consent of the insured owner, and that Ganaway was not, at the time of the accident, acting in the scope and course of his employment. Both of these issues were resolved by the jury for the plaintiffs.

The liability of Peerless is dependant upon whether Ganaway was an "insured" under the omnibus clause of the policy which included any person while using the automobile, provided the actual use was with the permission of the named insured. The courts of Louisiana have gone far in extending coverage under the omnibus clauses of insurance policies. *Gonzalez v. National Surety Corporation*, 5th Cir. 1959, 266 F. 2d 667. Under the liberal view which obtains in Louisiana, if there is initial permission for the use of the vehicle, the coverage of the insurance attaches even though the liability arises out of a subsequent use for an unauthorized or unintended purpose. *Parks v. Hall*, 189 La. 849, 181 So. 191; *Waits v. Indemnity Insurance Co. of North America*, 215 La.

349, 40 So. 2d 746; *Dominguez v. American Casualty Co.*, 217 La. 487, 46 So. 2d 744. But it does not follow that, under all circumstances, a person injured or the representatives of a person killed would have a cause of action under the omnibus clause against the insurer for injuries or death caused as a result of the negligent operation of the vehicle. *Parker v. Great American Indemnity Co.*, La. App. 81 So. 2d 79. So, if Ganaway had permission, express or implied, to take the Jeep from the garage of his employer on the morning of the fatal accident, that permission would be continued and extended while the vehicle was being used in excess of the authority given or in violation of the employer's rules. *Hartford Accident & Indemnity Co. v. Collins*, 5th Cir. 1938, 96 F. 2d 83, cert. den. 305 U.S. 627, 59 S. Ct. 89, 83 L. Ed. 401. There is not any evidence in the record before us showing that Ganaway had any permission to use the Jeep on that morning. The plaintiffs contend that where a car is driven by an employee of the owner, a presumption arises that the employee was acting in the scope of his employment at the time of the accident. For this proposition the plaintiffs refer us to *Antoine v. Louisiana Highway Commission*, La. App., 188 So. 443. While there may be such a presumption applicable in a case asserting liability against the owner of a motor vehicle, and Antoine was such a case, it is the rule that in a suit on the omnibus clause of an automobile liability policy the plaintiffs have the burden of producing evidence that the vehicle was being used with the permission of the insured owner. *Abshire v. Audubon Insurance Co.*, La. App. 99 So. 2d 395; *Standard Accident Insurance Co. v. Rivet*, 5th Cir. 1937, 89 F. 2d 74; *Continental Casualty Co. v. Quebedeaux*, 5th Cir. 1956, 234 F. 2d 241. There is, as is

pointed out in the Rivet opinion, a difference between a master and a servant case and one asserting an insurance liability.

There was evidence from which it might have been inferred that Ganaway had general authority to take the Jeep out for the purpose of servicing ambulances and other vehicles and for procuring repair parts. It is suggested by the plaintiffs that Ganaway might have gone on such a mission prior to his inviting Mrs. Schnauder to become a passenger in the car, thus warranting the inference that the use at the time was permissive, or at least that there had been an initial permissive use which would subject the insurer to liability even though the use at the time was unauthorized or prohibited. The plaintiffs contend that Ganaway was driving toward the Hospital at the time of the accident and from this they say it may be inferred that he was then returning the Jeep and so was in the course of his employment. The difficulty with the plaintiffs' postulates is that they are based upon conjecture rather than proof. Such meagre evidence as there is would seem to negative any inference that Ganaway had taken out the Jeep for any purpose on behalf of his employer. The permission to use an automobile in the business of the owner does not authorize an employee to take it for use on a mission of his own. *Sun Underwriters Insurance Co. v. Standard Accident Insurance Co.*, La. App., 47 So. 2d 133; *Wilson v. Farnsworth*, La. App., 4 So. 2d 247. Cf. *Farnet v. DeCuers*, La. App., 195 So. 797. No different rule would apply even though it might be inferred that Ganaway was, when the accident happened, in the process of returning the car to his employer. *Wilson v. Farnsworth, supra.*

The plaintiffs point to evidence showing that about a month before the accident with which we are here concerned, Ganaway had taken the Jeep for the purpose of getting coffee. This, say the plaintiffs, justifies an inference that there was a customary use from which permission might be implied, as in the case of *Fulco v. City Ice Service, Inc.*, La. App., 59 So. 2d 198. But a custom does not arise from a single incident. The evidence also shows that Ganaway was reprimanded for taking the Jeep without permission and threatened with discharge if he was caught doing it again.

We reach the conclusion that the plaintiffs cannot recover on the insurance policy because of the absence of evidence that Ganaway was using the Jeep in the course of his employment by the Hospital, or that he had been given any permission, express or implied, to use it on any mission of his own. Having reached this conclusion it becomes unnecessary that we consider the appellant's specifications of error relating to the refusal of the court to give requested charges and the refusal to direct a verdict because of the insufficiency of the evidence to show negligence on the part of Ganaway. Neither do we discuss the question as to whether there should have been a dismissal of the action as to Joan Schnauder on the ground that the jurisdictional amount was not shown. One of the remaining questions submitted might, we think, be commented on briefly. Three jurors were excused because of their acquaintance with counsel for the

insurance company, and it is asserted that in so doing, the court erred. One was excused because he had known the attorney "many, many years." Another had known him "for some time" "just as a friend." The third knew him "personally" "quite a number of years" having "met him at different occasions," and at "social functions." We think the jurors were improperly excused. As this Court has said, "A juror is not per se disqualified because he is acquainted with or a friend of counsel in a case, whether advocating the cause of a private litigant or prosecuting in a criminal case." *Roberson v. United States*, 5th Cir. 1957, 249 F. 2d 737, cert. den. 356 U. S. 919, 78 S. Ct. 704, 2 L. Ed. 2d 715.

In the absence of evidence from which it was shown or might be inferred that the Jeep was being driven by Ganaway with express or implied authorization or permission of the insured there is no legal support for the judgment against the insurance company. Therefore the judgment must be reversed and be here rendered for the appellant. *Continental Casualty Co. v. Quebedeaux, supra.*

REVERSED AND RENDERED.

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth
Circuit, New Orleans, Louisiana
June 14, 1961

JUDGMENT.

Extract from the Minutes of May 19, 1961

PEERLESS INSURANCE COMPANY,

No. 18600. versus

JOAN SCHNAUDER and PATRICIA SCHNAUDER, thru JOYCE SCHNAUDER ERNEST, Their Next Friend.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed and here rendered for appellant, Peerless Insurance Company;

It is further ordered and adjudged that the appellees, Joan Schnauder and Patricia Schnauder, thru Joyce Schnauder Ernest, Their Next Friend, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

* * * * * *

CERTIFICATE.

I, the undersigned, counsel for petitioner, hereby certify that I have served a copy of the foregoing petition upon William A. Porteous, Jr., of the firm of Porteous & Johnson, attorneys for respondent, at American Bank Building, New Orleans, Louisiana, this 14th day of July, 1961, by mailing a copy thereof postage prepaid to William A. Porteous, Jr., Esq., in care of Porteous & Johnson, American Bank Building, New Orleans, Louisiana.

A. H. REED,
Attorney for Petitioner.